

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 03-13878-MWV
Chapter 11

Bob Desmond,

Debtor

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MEMORANDUM OPINION

The Court has before it the Debtor's motion to transfer In re Weaver Cove, LLC, 1:04-bk-12499 (Bankr. D.R.I. 2004) to the Bankruptcy Court for the District of New Hampshire. The motion is opposed by U.S. Asset Funding, L.P., Vladimir Pave and Gary Pave, some or all of which are creditors in both cases.

JURISDICTION

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

DISCUSSION

The motion is brought pursuant to 28 U.S.C. § 1408, which is implemented by Federal Rule of Bankruptcy Procedure 1014(b).

If petitions commencing cases under the Code are filed in different districts by or against (1) the same debtor, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, on motion filed in the district in which the petition filed first is pending and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the court may determine, in the interest of justice or for the convenience of the parties, the district or districts in which the case or cases should proceed. Except as otherwise ordered by the court in the district in which the petition filed first is pending, the proceedings on the other petitions shall be stayed by the courts in which they have been filed until the determination is made.

FED. R. BANKR. P. 1014(b). The Desmond case was filed in the District of New Hampshire on November 13, 2003. Weaver Cove, LLC, (hereinafter, “Weaver Cove”) was subject to an involuntary petition filed against it in Rhode Island on August 4, 2004, to which it consented to an order for relief on August 26, 2004. Weaver Cove is a Delaware LLC, and Desmond alleges that he owns all of the issued and outstanding membership interests of the LLC. Under these factors, it appears that Weaver Cove is an affiliate of Desmond and, since the Desmond case preceded the Weaver Cove case, the motion is properly filed in the District of New Hampshire.

The Court, in its sound discretion, decides whether to deny or grant a motion to transfer venue. In re Pinehaven Assoc., 132 B.R. 982, 987 (Bankr. E.D.N.Y. 1981) (courts decide each case based on all of the relevant factors); In re Manville Forest Prods. Corp., 896 F.2d 1384, 1391 (2d Cir. 1990). The moving party bears the burden of proof, and that burden must be carried by a preponderance of the evidence. Id. at 1390.

Desmond bases his motion on two theories. The first is that the case should be transferred in the interest of justice and for the convenience of the parties. The second is that under Delaware law, when Desmond filed his bankruptcy, the LLC dissolved under Delaware law, and the assets became assets of Desmond. This Court rejects both theories for the reasons stated below.

I. The Convenience of the Parties and in the Interest of Justice

Both the movant and the opposing parties cite In re Commonwealth Oil Refining Co. for the five factors which this Court should consider. They are:

- (1) The proximity of creditors of every kind to the Court;
- (2) The proximity of the bankrupt (debtor) to the Court;
- (3) The proximity of witnesses necessary to the administration of the estate;
- (4) The location of the assets;
- (5) The economic administration of the estate; and
- (6) The necessity for ancillary administration if bankruptcy should result.

In re Commonwealth Oil Refining Co., 596 F.2d 1239, 1247 (5th Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980). Only the Debtor cites the sixth factor.

A review of the schedules of Weaver Cove reveals the following: There are listed thirteen unsecured creditors, including Desmond, six of which, including Desmond, have Rhode Island addresses. The seven remaining creditors all have Massachusetts addresses. There are no creditors listed with New Hampshire addresses. The Rhode Island court located in Providence is about the same distance from the Boston area as is the New Hampshire court located in Manchester.

Although Desmond asserts that his primary residence is in New Hampshire, he is listed as a creditor at his Rhode Island address in the Weaver Cove schedules. There is no dispute that he has an apartment and an office in Rhode Island.

The Weaver Cove case revolves around what the Debtor lists on Schedule B as “Equitable Interest in purchase and sale agreement for sale of commercial real estate in Portsmouth, Rhode Island.” This is, by far, the major asset in the Weaver Cove case. The other party to that contract is Melville

Marine Industries, the apparent current owner of the property, which is the subject of the above-referenced contract located in Portsmouth, Rhode Island. It is clear from the above that the first four factors support a finding that Weaver Cove stay in Rhode Island, and this Court so finds.

The Court is not convinced that the economic administration of the case favors the Debtor, Desmond. For approximately eight months, Desmond ran Weaver Cove without disclosing to this Court the nature of his activities or seeking approvals from this Court on matters related to Weaver Cove, such as his agreement to transfer all or part of his membership interests in Weaver Cove, which interests are clearly an asset of this bankruptcy estate. Based on all of the above, the Court finds that the transfer of the Weaver Cove case to New Hampshire is neither required for the convenience of the parties nor in the interest of justice.

II. Dissolution of the Delaware LLC

The second theory espoused by Desmond is that, upon his filing, the LLC dissolved pursuant to Delaware law and “equitable title to the Weaver assets, including the Purchase and Sale Agreement, passed to the Debtor because he had to distribute the Weaver Assets to himself, subject only to paying the lawful claims of Weaver creditors or making reasonable provision for their payment.” (Motion, ¶ 15.) This Court disagrees. Delaware statute, Title VI § 18-801, contemplates a period of winding up the LLC: “(a) a limited liability company is dissolved and its affairs shall be wound up upon the first to occur of the following.” 6 Del.C. § 18-801(a). In the case of In re Midpoint Development, LLC, 313 B.R. 486 (Bankr. W.D. Okla. 2004), construing Oklahoma law, the court found a dissolved LLC, like a corporation, can be a debtor in bankruptcy because it does not cease to exist on dissolution, but rather continues for winding up purposes until cancellation of its articles of organization. Under Delaware law, Title VI § 18-201, the limited liability company is a separate legal entity “the existence of which as a separate legal entity shall continue upon cancellation of the limited liability company’s certificate of formation.” 6 Del.C. § 18-201(b). Weaver Cove did not file a cancellation of its certificate of formation.

At trial, the movant cited the case of Kidde Indus., Inc. v. Weaver Corp., 593 A.2d 563 (Del. Ch. 1991), in support of its position that Desmond held an equitable interest subject to the claims of creditors. That case, however, said that upon dissolution, “its assets were held in trust for the benefit of both its creditors and its stockholders,” not held by the stockholders subject to the interest of creditors as the movant asserts.

Finally, this Court finds that Desmond is estopped from now taking the position that Weaver Cove dissolved upon the filing of his bankruptcy petition since he continued to do business on behalf of Weaver Cove from the time of the filing of his petition in November 2003 until at least June 2004 and, more likely, August 2004, when the involuntary petition was filed, including participating in judicial proceedings in the state courts of Rhode Island. See In re Martin-Trigona, 760 F.2d 1334 (2d Cir. 1985) (holding that debtor corporation was estopped from asserting non-existence when held itself out as a corporation). For all of the above reasons, the motion to transfer the Weaver Cove case to New Hampshire is denied.

CONCLUSION

This opinion constitutes the Court’s findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 1st day of April, 2005, at Manchester, New Hampshire.

/s/ Mark W. Vaughn
Mark W. Vaughn
Chief Judge